(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 521 /2001.

APPELLANT (In jail) : DHENU PAL,
S/o Khulan Sai Kanwar, aged about 30 years, Farmer, R/o Gajmari Para, village Tarekela, Police Station Bagbahar, Distt. Jashpurnagar (C.G.).

V E R S U S

RESPONDENT : STATE OF CHHATTISGARH
Through : P.S. Bagbahar
Distt. Jashpurnagar.

CONVICTION	SENTENCE
U/S 302 of I.P.C.	Life Imprisonment with fine of Rs 5,000/- in default of fine further S.I. for 5 years.

MEMO OF CRIMINAL APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE, 1973 :

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by Shri Mahesh Ramdas Advocate
R. to AR

(54)

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 521 OF 2001

DHENU PAL

VS.

STATE OF CHHATTISGARH

JUDGMENT FOR CONSIDERATION

Sd/-
DHIRENDRA MISHRA
Judge

HON'BLE SHRI L.C. BHADOO, J

Sd/-
L.C.BHADOO
Judge
22 /11/2006

POST FOR JUDGMENT ON 23rd NOVEMBER 2006

Sd/-
JUDGE
22 /11/2006

(35)

HIGH COURT OF CHHATTISGARH : BILASPUR

DIVISION BENCH : HON'BLE SHRI L.C. BHADOO AND

HON'BLE SHRI DHIRENDRA MISHRA, JJ

CRIMINAL APPEAL NO. 521 of 2001

Appellant : Dhenu Pal

Versus

Respondent : State of Chhattisgarh

Mr. Rakesh Pandey, Counsel for the appellant.
Mr. U.N.S. Deo, Govt. Advocate for the State/respondent.

J U D G M E N T
(23-11-2006)

Per Dhirendra Mishra, J

The appellant has preferred this criminal appeal under Section 374(2) of Code of Criminal Procedure against the impugned judgment dated 20th January 2001 passed in S.T. No. 20/2000 by learned Additional Sessions Judge, Jashpur whereby the learned Additional Sessions Judge after holding the accused/appellant guilty for causing homicidal death of deceased Munki Bai has convicted him under Section 302 of the Indian Penal Code and sentenced to undergo life imprisonment and pay a fine of Rs. 5,000/-.

2. Case of the prosecution in brief is that wife of the appellant namely Gulabi Bai died on 9.11.1999. She was critically ill on the date

of incident and villagers including Munki Bai (since deceased) had gone to see her to the house of appellant at about 10.00-11.00 p.m. After some time Gulabi Bai died. The moment the appellant learnt that his wife is dead, he picked up an axe and assaulted three four times the Munki Bai calling her witch, you have swallowed my wife, as a result of which her skull got shattered and brain material came out and she died instantaneously. Baldev Sai (PW-9), husband of the deceased lodged First Information Report (Ex.P/12) on 10.11.1999 at about 7.20 a.m. The investigating officer Rajesh Shrivastava (PW-8) after registering crime No. 63/99 and merg intimation of Ex.P/13, proceeded for investigation and prepared the inquest of Ex.P/3 after due notice to the witnesses in their presence. Body of the deceased was sent for postmortem examination to Primary Health Centre, Farsa Bahar where Dr. (Smt.) Kiranti Kerketta (PW-7) conducted postmortem and submitted her report of Ex.P/10. During investigation plain and bloodstained soil from the place of incident and broken bangles of the deceased were taken into possession vide Ex.P/2. On the basis of memorandum of Ex.P/7 weapon of offence axe was taken into possession vide Ex.P/8. Site plan of Ex.P/9 was got prepared by Halka Patwari G.R. Rathia (PW-6). Weapon of offence was sent to the doctor for examination whereupon the doctor after examining the same submitted her opinion of Ex.P/11 that the injuries present over the person of the deceased could be caused by the weapon seized. The investigating officer also prepared spot map of Ex.P/14. The bloodstained clothes and bloodstained hair of the deceased were taken into possession vide Ex.P/15. After completing investigation charge

sheet was filed in the Court of Chief Judicial Magistrate, Jashpurnagar who in turn committed the case to the Court of Sessions Judge, Raigarh and the same was received by the learned Additional Sessions Judge on transfer for trial.

3. Charge under Section 302 of the Indian Penal Code was framed against the appellant, who abjured his guilt. The prosecution in order to establish the charge against the appellant examined nine witnesses in all. Thereafter, statement of the accused was recorded under Section 313 of the Code of Criminal Procedure. The accused/appellant denied the circumstances appearing against him in the prosecution case and pleaded innocence and false implication in the crime. He further stated that Munki Bai was his aunty and therefore, why he would kill her.

4. However, learned Additional Sessions Judge after hearing counsel for the appellant and Additional Public Prosecutor for the State convicted and sentenced the accused as mentioned above.

5. Learned counsel for the appellant submits that case of the prosecution is based on the statements of eyewitnesses namely Mahendra Singh (PW-1), Badhutram (PW-2), Sitabai (PW-3) and Somaribai (PW-4). All these witnesses have not stated anything against the appellant in their examination in chief and they were declared hostile. However, the Court below selectively relying upon their version given in the cross examination and also considering their diary statements recorded under Section 161 of the Cr.P.C. has held the appellant guilty of the above offence. It is further submitted that from bare perusal of the statements of these witnesses it is clear that

they are not the witness of truth and they have stated different fact in their examination in chief, cross examination by the prosecution and further cross examination by the defence. Therefore, no credence could be given to the statements of these witnesses and the judgment of the trial Court is based on conjuncture and surmises. He submits that the Court below has also based the conviction on the circumstance that the dead body of Munki Bai was found in the house of the appellant and he has failed to explain the circumstances under which the dead body was found in his house and as such adverse inference has been drawn against him.

6. On the other hand, Mr. U.N.S. Deo learned Govt. Advocate for the State submits that conviction may be based on the evidence of hostile witness and what is described as a hostile witness, does not completely efface his evidence simply because he is characterized as a hostile witness by the Court giving permission to the prosecutor to cross examine such witness.

7. Learned counsel for the State/respondent placed his reliance on the judgments of the Supreme Court in the matter of **Bhagwan Singh Vs. The State of Haryana,** reported in **AIR (1976) 1 SCC 389,** in the matter of **Sri Rabindra Kumar Dey Vs. State of Orissa** reported in **(1976) 4 SCC 233,** in the matter of **Anil Ram Vs. State of Bihar** reported in **AIR 2001 SC 3173** and in the matter of **Radha Mohan Singh @ Lal Saheb & others Vs. State of U.P.** reported in **2006 AIR SCW 421.**

8. We have heard learned counsel for the parties and perused the material available on record as also the impugned judgment of the trial Court.

9. Homicidal death of Munki Bai is not in dispute. Even otherwise from perusal of the postmortem report of Ex.P/10 in which Dr. (Smt.) Kiran Kerkette who performed postmortem on the body of deceased has noticed a lacerated wound over the left parietal area extended from occipital region in the size of 8" x 4" scalp deep and fracture of left parietal bone and occipital bone and opined that the cause of death was on account of coma due to blood collection in the brain and the same was homicidal in nature, the homicidal death of Munki Bai is established.

10. Learned Additional Sessions Judge has based the conviction of the appellant on the statements of eyewitnesses who have been examined as PW-1, PW-2, PW-3 and PW-4. Learned trial Court after considering the diary statements of Mahendra Singh (PW-1), Badhutram (PW-2), Sitabai (PW-3) and Somaribai (PW-4) of Exs.P/1, P/4, P/5 and P/6 and their statements in cross examination has held the charge against the accused/appellant proved. Though the above four witnesses in their examination in chief and cross examination by the defence have denied that they saw the incident and stated that in fact they learnt about the same and informed about the matter to the police. However, the trial Court in the light of their replies in the cross examination by the prosecution, has held that an inference may be drawn that these witnesses are eyewitnesses who saw Dhenupal

assaulting Munki Bai in his house with axe but in order to save the accused from punishment they had resolved among themselves to speak lie and thus from the evidence of these witnesses the appellant killed Munki Bai is proved. The Court below in paragraph – 15 of its judgment has further held that the accused has not explained as to how bloodstained dead body of Munki Bai was found from his house if he had not murdered her and how bloodstained soil and bloodstained axe were seized from his possession.

11. PW-1 Mahendra Singh in his examination in chief has stated, "he knows the accused Dhenupal and deceased Munki Bai." On the date of incident at about 9.00-9.30 in the night brother of the accused came to his house and informed that Gulabobai was sick, let us go to see her whereupon he went to the house of Gulabobai and after some time returned from there. In the same night at about 11.00-12.00 p.m. the police came to the village, then he learnt about Munki Bai. He personally does not know anything and Munki Bai is the aunty of the accused. In the cross examination by the prosecution he has stated that when he went to the house of the accused, the accused was present there, he was not agitated. It is true that he saw the dead body of Munki Bai in the house of the appellant which was lying in the room. He has further stated that it is true to say that whatever he knew about the incident, he told the same truthfully to the police who recorded his statement of Ex.P/1. However, he denied that the accused killed Munki Bai. He accepted that he had gone to lodge report with Baldev in the morning. He has further denied the contents of seizure memo of Ex.P/2. In the cross examination by the defence he has accepted the

suggestion that he did not see the accused assaulting Munki Bai and he learnt about the death of Munki Bai in the evening. He has also accepted the suggestion that police did not read over his statement to him and he signed the documents out of fear of the police. He has also accepted the suggestion that he does not know as to when and how Munki Bai died.

12. PW-2 Badhutram has also not stated anything in his examination in chief. However, in the cross examination by the prosecution he has denied the suggestion that the statement from 'A' to 'A' of Ex.P/4 was given by him to the police. He has admitted that there was a meeting in the village on the previous day and he has been communicated that in the meeting it has been resolved that Dheunpal is to be saved and he was to simply state this much that he went to see the sick wife of Dhenupal and advised him for treatment and he was not to tell in the Court as to what he had seen and told to the police. He has also stated that it is true that when Munki Bai fell in the house of the accused, Mahendra and he fled from there and thereafter went to Baldev. In the cross examination by the defence he has again denied any knowledge about the incident. He has also denied any knowledge as to how the deceased died and when she died and who killed her and stated that he simply told the police that he does not know anything about the death of Munki Bai.

13. PW-3 Sitabai has also been declared hostile as she did not utter a single word against the appellant in her examination in chief. However, in the cross examination she has admitted that the deceased

was considered to be a witch in the village and very few persons would visit her. She has further stated that it is true to say that in her and others presence the accused assaulted the deceased with axe and thereafter ran away and he stated that the she (Munki Bai) had swallowed his wife. She has also stated that during interrogation she had stated the truth to the police as she apprehended that if she tells a lie, the police may do something. She also accepted the suggestion that there was a meeting in the village and the villagers had decided to save the appellant and as per the decision of the meeting, they have to say that they have not seen anything. She further stated that the statement of Ex.P/5 was given by her out of fear of the police truthfully. However, in the cross examination this witness has accepted the suggestion given by the defence that since the wife of appellant Dhenupal was sick, she along with Siyabai and Somarubai had gone to his house and after sometime returned from there and it is true that by that time Munki Bai had not arrived there. We came to know about the incident next day that Munki Bai had died. It is correct to say that she did not know as to how Munki Bai died, who kill her and that there was no meeting among the villagers to save the Dhenupal. She has stated that she had already told all these things to the police in her statement but the police did not read over the statement to her. Similar is the statement of Somari Bai (PW-4) who has not stated anything in her examination in chief against the appellant. However, in the cross examination she accepted the suggestion that in the village it has been resolved that Dhenupal is to be acquitted. In further cross examination by the defence she has again taken a summersault and stated that as

long as she was in the house of Dhenupal, Munki Bai did not reach there. PW-9 Baldevsai Kanwar, husband of the deceased, has stated that the accused is his relative whereas deceased Munki Bai is his wife and the accused has killed her some one year back on the date of incident at about 11.30 p.m. He was witnessing Karma Dance when Sita Bai came and informed that she had gone to see the wife of Dhenupal to his house where Dhenupal has killed her. On hearing this, he started weeping. However, he did not go to see his wife. Dhenupal had himself gone to lodge the report and police arrived in village at about 1.00 in the night. He has also stated that till date he has not seen the dead body of his wife. Subsequently, he has stated that when police came he went to see Munki Bai to the house of Dhenupal and saw that the dead body was lying near the door of the house of Dhenupal on the slope. The inspector asked him to come to police station in the morning whereupon he went in the next morning and lodged the report of Ex.P/12. In the cross examination he has stated that when he reached the police station he was not interrogated nor he told anything to the police. He was informed that they have already recorded the information and he is to put his thumb impression, whereupon he put his thumb impression. It is further stated that the police neither read over the report to him nor explained the same to him. He did not give any information to the police.

14. In the matter of Bhagwan Singh (supra) the Supreme Court in paragraph – 8 of its judgment has held thus:

> "On facts, the prosecution could have even avoided requesting for permission to cross-examine the witness

under Section 154 of the Evidence Act. But the fact that the court gave permission to the prosecutor to cross-examine his own witness, thus characterizing him as, what is described as a hostile witness, does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence. In the present case this test is satisfied and his testimony is amply corroborated.

15. In the above mentioned case PW-1 Jagat Singh was the star witness. The appellant approached this witness and attempted to bribe him in order to ruin the prosecution case against two co-accused. This witness did not refer to the co-accused in his examination in chief and thereby on the request of the prosecution, permission to cross-examine him under Section 154 of the Evidence Act was accorded by the trial Court. However, the appellant was convicted and other co-accused persons to whom Jagat Singh did not refer were acquitted. The judgment was confirmed by the High Court and against that S.L.P. was preferred which was dismissed with the above observation.

16. In the matter of Sri Rabindra Kumar Dey (supra) the Supreme Court relying upon the judgment delivered in the matter of Bhagwan Singh (supra) held that the mere fact that a witness is declared hostile by the party calling him and allowed to be cross examined, does not make him an unreliable witness so as to exclude his evidence from consideration altogether. In this case also the trial Court convicted the

accused by not relying upon the statement of the prosecution witnesses who were declared hostile and by completely ignoring the statement given by them which fortified the defence of the accused.

17. In the matter of Anil Rai (supra) the Supreme Court reiterated the position of law enunciated by it in the aforementioned judgments.

18. In the matter of Radha Mohan Singh (supra) the Supreme Court in paragraph – 7 of the judgment has held that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him but it can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.

19. In the above cited case the facts are that PW- 3 Mohan Yadav fully supported the prosecution case in his examination in chief and in his cross examination which was recorded on the same day. He gave details of weapon of offence carried by each of the accused and also the specific role played by them in assaulting the deceased and other injured persons. As his cross examination could not be concluded it was resumed in the following next day and then he gave statement that he could not see the incident on account of darkness and at that stage he was declared hostile and cross examined by the prosecution. Under these circumstance, the Supreme Court held that the evidence of such witness which is dependable can be accepted referring to the judgment of Bhagwan Singh (supra).

20. Thus in the light of above cited judgments of the Supreme Court, if we examine the case in hand, we are unable to accept the arguments advanced by counsel for the State/respondent that the statements of the witnesses PW-1, PW-2, PW-3 and PW-4 given by them in their cross examination are also acceptable. We have already referred to their statements in the foregoing paragraphs. A bare perusal of the accounts given by these four witnesses in their statements goes to show that they have not been truthful witnesses right from the inception and the Court below was not justified in relying upon their statements and their diary statements for holding the appellant guilty even after holding that these witnesses after taking an unanimous decision of protecting the accused from punishment, are lying. So far as the statement of PW-9 Baldevsai, husband of the deceased, is concerned, he also does not throw any light on the incident as he is not an eyewitness to the incident and whatever he has stated to the police is based on information given by others. From the statement of this witness it appears that the dead body was lying before the door of the accused on the slope.

21. So far as the other circumstance that dead body of deceased Munki Bai was found in the house of the accused and he has not offered any explanation for the same, is concerned, from the evidence available on record we have observed that number of villagers had visited the house of the appellant to see the condition of his critically ill wife Gulabo Bai who died in their presence. Except the above four witnesses no other witness has been examined by the prosecution who has seen the appellant assaulting the deceased. If the version

given by the above witnesses in their cross examination is ignored, in that case the conviction of the appellant cannot be based only on the evidence that the dead body was found in his house particularly when there is a evidence to this effect that the deceased was considered to be a witch by the villagers in general and at the time of incident number of villagers were present in the house of the appellant. The other factor which throws serious doubt on the case of the prosecution as recorded in paragraph 16 of the judgment is that though information of the incident was available with the police in the night itself, however, no steps were taken by the investigating officer and even after reaching the place of incident on the night itself, no Dehati Nalishi was registered and the FIR of Ex.P/12 was recorded only in the following morning. However, the Court below instead of extending benefit of these lapses in the investigation to the accused, convicted him on the basis of conjecture and surmises which is based on inadmissible evidence available in the charge sheet.

22. So far as recovery of weapon of offence axe at the instance of the appellant is concerned, the Court below has itself expressed doubt about recording of memorandum and therefore, any recovery of weapon in pursuance of the above memorandum can not be used as an incriminating circumstance against the appellant particularly when the recovered weapon was not sent for examination for confirmation of presence of blood on it.

23. It is the cardinal principles of criminal jurisprudence (i) that the onus lies affirmatively on the prosecution to prove its case beyond

reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case, (ii) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and (iii) that the onus of the prosecution never shifts. The suspicion, howsoever strong it may, cannot take the place of proof.

24. Thus, on the basis of aforesaid discussion we are of the considered opinion that the Court below was not justified in basing the conviction of the appellant on the statements of the witnesses examined as PW-1, PW-2, PW-3, PW-4 particularly after recording a finding that the above witnesses were stating falsehood and the Court below ought to have extended benefit of doubt to the appellant. Therefore, for the aforesaid reasons, the impugned judgment of conviction and order of sentence passed by the Court below cannot be sustained.

25. In the result, the appeal is allowed. Conviction of the appellant under Section 302 of the IPC and sentence imposed thereon are set aside. The appellant is directed to be set at liberty forthwith, if not required to be detained in connection with any other offence.

Sd/-
L.C.BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge